BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company to Increase its Authority to Finance Short-Term Borrowing Needs and Procurement-Related Collateral Costs by $2.0 Billion to an Aggregate Amount Not to Exceed $6.0 Billion. (U 39-E)	Application 18-10-003 (Filed October 9, 2018)

RESPONSE OF THE UTILITY REFORM NETWORK TO MOTION OF PACIFIC GAS AND ELECTRIC COMPANY FOR EXEMPTION FROM PUBLIC UTILITIES CODE SECTIONS 823 AND 851

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On January 18, 2019, Pacific Gas and Electric Company (PG&E) filed a motion seeking exemptions from Public Utilities Code sections 823 and 851 in order to pursue debtor-in-possession (DIP) financing to enable an upcoming voluntary Chapter 11 bankruptcy filing the utility intends to make on or about January 29, 2019. Later on January 18th, Assistant Chief Administrative Law Judge Michelle Cooke distributed an e-mail ruling which provided that, in lieu of written responses to PG&E's motion, the assigned Administrative Law Judges would hear argument during a prehearing conference to be held on January 23, 2019.

The Utility Reform Network (TURN) intends to appear at and participate in the upcoming prehearing conference. However, PG&E's motion implicates a number of issues that might be difficult to adequately discuss for the Commission's purposes if those issues were raised for the first time at the prehearing conference. Therefore, TURN has prepared this written response setting forth some of the arguments we may make at the prehearing conference, with the hope that doing so will permit a fuller exposition of the underlying matters and a better-informed Commission decision on PG&E's motion.

I. Summary of TURN's Response

PG&E's motion asks the Commission to provide a blanket exemption to the utility's upcoming bankruptcy financing needs, thus enabling PG&E to encumber utility assets as the utility sees fit in the process of arranging debtor in possession (DIP) financing for the expected bankruptcy petition. There are several substantial defects that should give the Commission pause here. First, PG&E is asking for a fundamental revision to its financing, and that revision presents substantial risk to the utility' customers. Today, the utility's failure to perform on its

short-term financing obligations does not bring with it the possibility that assets necessary for the provision of utility service might be seized or forfeited to the lender. The modification PG&E seeks here would make such outcomes a possibility. The Commission should recognize that the regulatory compact includes not just the regulated utility devoting its assets to the provision of a public service, but also ensuring that those assets remain available until no longer needed for that purpose. Short-term financing that carries with it no security interest or other encumbrance on utility assets is consistent with this element of the regulatory compact. PG&E's proposed exemption would permit PG&E to choose to add such encumbrances to its short-term financing going forward, and to do so without further Commission review. PG&E's motion fails to directly acknowledge, much less address in any meaningful way, the import of the change sought therein.

Second, PG&E's showing seems premised on the notion that the Commission should take steps to enable the utility's bankruptcy filing, such that the utility can demonstrate the reasonableness of its requested relief merely by asserting that it will make the bankruptcy process go more smoothly. The Commission needs to reject such an approach and instead maintain its practice of requiring a demonstration that the requested relief is reasonable based on factors relevant to the Commission's Constitutional and statutory authority. As the Commission should recall from PG&E's previous foray into a voluntary bankruptcy proceeding, bankruptcy is a process that muffles the Commission's voice, and arguably silences ratepayers altogether.[1] It is a process designed and administered to achieve goals that can be very different than the

[1] In PG&E's prior bankruptcy, the United States Trustee appointed a Ratepayers' Committee to represent the interests of ratepayers throughout the bankruptcy proceeding. PG&E filed a motion with the Bankruptcy Court seeking to vacate that action as exceeding the Trustee's authority. The Bankruptcy Court granted PG&E's motion and vacated the Ratepayers' Committee.

achievement of just and reasonable rates and the provision of safe and reliable surface. In short, it may be that the Commission cannot avoid participating in PG&E's Chapter 11 reorganization should the utility follow through on its announced plan to pursue such relief. But that does not mean that the Commission should accept outcomes as reasonable based on nothing more than PG&E's assertion that it needs the relief for purposes of its Chapter 11 reorganization.

Third, PG&E's current motion suffers from the same infirmities that caused TURN to oppose its amended application as set forth in the protest filed December 17, 2018. The utility has failed to provide sufficient description or detail regarding the transactions it intends to enable through the requested exemption and the resulting ability to encumber utility assets as part of its short-term financing. As the most obvious example, PG&E has presented nothing that would permit a meaningful calculation of the benefits it expects to achieve under its approach, or a meaningful comparison of such benefits to the increased risk to ratepayers. We know from PG&E's January 14, 2019 8-K filing (attached to its motion) that the utility expects to have approximately $5.5 billion of committed DIP financing before the end of this month.[2] It would not take much for PG&E to present at least illustrative figures showing anticipated financing rates absent the relief it seeks here, and corresponding rates if its motion is granted. Applying those rates to the portion of DIP financing that might be achieved through short-term instruments would give the Commission at least a rough idea of the potential financing cost savings. Yet the utility has failed to present even such a rough estimate, instead choosing to rely on general assertions. The Commission must require a more detailed demonstration of reasonableness before granting the relief PG&E has requested.

[2] PG&E Motion, p. 1.

Fourth, the Commission should require PG&E to share with the agency and, to the extent feasible, with interested parties the utility's analysis that led it to conclude that a voluntary Chapter 11 reorganization petition is the best response to current circumstances. PG&E's January 14th 8-K statement states very clearly that the utility believes that if it were permitted to secure its debt with utility assets, it "could access, outside of a restructuring under Chapter 11, a significant amount of capital" such that "PG&E could extend its liquidity for an extended period of time."[3] As of now, only PG&E's boards of directors are privy to the reasoning that led to the determination that a non-bankruptcy approach "is not in the best interests of PG&E and its stakeholders." The Commission should expect that PG&E's directors are looking out for what is in the best interests of PG&E, not necessarily the public interest. Accordingly, the Commission should insist on the opportunity to make its own assessment of which approach would serve the best interests of California and the array of stakeholders affected by the utility's operations. TURN recommends that before the Commission adopts the exemption PG&E seeks, it should require PG&E share with the agency the "thorough analysis" that was purportedly the basis for the decision to pursue Chapter 11 relief even as it acknowledged that it had alternative avenues for obtaining the funds necessary for continued operation.

II. PG&E's Motion for Exemptions

PG&E's motion is quite abbreviated, consisting of all of two pages plus an attachment. The utility begins by describing its request as seeking exemptions for purposes of achieving debtor-in-possession (DIP) financing for purposes of the Chapter 11 reorganization filing the utility intends to make on or about January 29, 2019.[4] The motion then quotes three sentences

[3] PG&E Motion, Attachment A (January 14, 2019 8-K filing), p. 5.

[4] PG&E Motion, p. 1.

from PG&E's January 14, 2019, 8-K filing made with the Securities Exchange Commission, describing the status of its efforts to obtain DIP financing, and asserting that obtaining such financing will give PG&E sufficient liquidity to fund its ongoing operations.[5] PG&E's motion then refers to three types of financing "facility," and asserts that "[a]ll facilities will be secured equally and ratably by a first lien security interest on the assets of the Corp and the Utility."[6]

Next, PG&E summarizes sections 823 and 851 of the Public Utilities Code with regard to the restrictions on its ability to issue short-term debt or encumber property necessary to provide utility service, and notes that the Commission can grant an exemption to those restrictions under Sections 829(c) and 853(b), respectively. PG&E is requesting an exemption based on its assertion that "the application of Sections 823 and 851 to the DIP financing are not necessary in the public interest."[7] PG&E then asserts that the DIP financing will provide liquidity the utility needs as it proceeds through the bankruptcy process, and notes that "any transaction outside of the ordinary course of business would be subject to bankruptcy court approval." On this basis, PG&E asks for the exemptions.

The utility's 8-K filing attached to the motion indicates that DIP financing may not be the only option, even though it is PG&E's choice at this time. The 8-K tells of PG&E's ability to "access, outside of a restructuring under Chapter 11, a significant amount of capital, but only in the form of secured indebtedness, using the Utility's assets to secure such additional funding, or

[5] *Id.*, quoting January 14, 2019 8-K filing, p. 5. The 8-K filing is Attachment A to the motion.

[6] *Id.*, p. 2. "Corp" appears to refer to PG&E Corporation, the holding company of PG&E.

[7] *Id.* The phrase "not necessary in the public interest" is the language that appears in both Sections 829(c) and 853(b) to describe the finding the Commission must make in order to grant an exemption.

in more esoteric forms of alternative capital that would be relatively dilutive or expensive."[8] If such financing were attained, "PG&E could extend its liquidity for an extended period of time." However, PG&E has opted for bankruptcy because, after a "thorough review," its "boards of directors have concluded" that doing this outside of Chapter 11 "is not in the best interests of PG&E and its stakeholders, and would not address the fundamental issues and challenges PG&E faces."[9]

III. Argument

A. PG&E Has Failed To Establish The Reasonableness Of A Blanket Exemption To The Encumbrances Restriction of Section 851.

Public Utilities Code section 851 prohibits the encumbrance of utility property without an appropriate Commission order. Section 851 promotes the important public interest of ensuring that the utility cannot encumber property necessary to the provision of utility services without first obtaining a Commission order. Such encumbrances can create the risk of seizure or foreclosure, events that could disrupt the utility's ability to provide service. It is a fundamental element of the regulatory compact that the regulated utility not only dedicates its assets to the provision of utility service, but does not take steps that could unduly jeopardize the assets' ongoing availability to that purpose. Section 851 appropriately ensures that the only encumbrances on utility property will be those that the Commission has reviewed and approved.

Section 853(c) gives the Commission the authority to exempt a utility from this restriction, but only if it finds that the application of that prohibition is not necessary for the public interest:

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[8] PG&E Motion, Attachment A (January 14, 2019 8-K filing), p. 5 [emphasis added].

[9] *Id.*

> The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest.

PG&E has failed to sufficiently demonstrate here that the encumbrance-limiting function of Section 851 is no longer valid or otherwise "not necessary in the public interest." The utility merely asserts that the DIP financing it has negotiated would require granting a security interest on its assets, and that the proceeds of the DIP financing provide PG&E with access to the capital needed to support ongoing operations. But neither of these factors sufficiently demonstrates the basis for an exemption. After all, Section 851 does not prohibit such encumbrances, but rather merely requires first obtaining Commission approval. In determining whether approval is warranted, the Commission considers the specifics of the financing transaction in question.[10] There remains a continuing public interest in knowing the terms and conditions of the transactions – for example, has PG&E agreed to onerous default and cure provisions (e.g., the utility forfeits the property if payment is even a day late, with no chance to cure), and, if so, were those provisions reasonable even under current circumstances? As another example, if assets are foreclosed upon in the event of default, does the lender have the ability to withhold use of the assets for utility service unless its conditions are accepted? If so, this possibility could

[10] For example, in D.17-10-014, the Commission granted the requested exemption from Section 851 for two gas storage companies that sought to encumber 100 percent of their respective assets as security for refinancing transactions. The underlying financial agreements were included as attachments to the application, permitting the Commission to assess the specific terms of the agreements along with the stated need for the funds that would be available under those agreements. D.17-10-014, pp. 8-9 and 12-13; Application 17-01-024, pp. 9-14, referencing Exhibits H-J. The Application may be accessed at http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M173/K179/173179013.PDF

effectively make continued provision of energy service in Northern California hostage to the demands of Wall Street.

B. PG&E's Motion Relies On A Misapprehension of the Commission's Role During Any Upcoming Bankruptcy, And of the Role The Bankruptcy Court Will Play In Approving Bankruptcy-Related Transactions

It is not enough to argue that, by granting the requested exemption, the Commission will smooth PG&E's path through Chapter 11 bankruptcy. The Commission's role is not to enable PG&E's voluntary bankruptcy, but rather continues to be to protect the balance of California's interests. The Commission continues to have its regulatory authority and obligations, starting with the general authority under Section 451 to ensure the utility provides safe and reliable service at just and reasonable rates. It may well be that there are steps the Commission should consider taking differently due to the fact that PG&E appears ready to voluntarily file for Chapter 11 bankruptcy protection. But it should only take such steps if it first determines that doing so is consistent with its authority and obligations under the California Constitution and the Public Utilities Code. And if PG&E wants the Commission to take such steps, it is incumbent upon the utility to make the requisite showing in support of its request. It has not done so here.

Similarly, the Commission should not treat potential bankruptcy court review of these transactions as a reasonable substitute for the state agency's review of matters that remain within its jurisdiction. PG&E notes that even if it gets its requested exemption, the bankruptcy court would need to approve "any transaction outside of the ordinary course of business."[11] But as the Commission knows from hard-learned lessons in the 2001-2004 period, the bankruptcy court is subject to very different statutes and rules, and will oversee a process that has very different

[11] PG&E Motion, p. 2.

goals and metrics than those that guide the Commission's regulatory process. It is folly to even suggest that the one is an acceptable substitute for the other.

C. The Motion Should Be Denied Due To A Lack Of Support; It Should Not Be Granted Until PG&E Has Disclosed and Explained Its Internal Review That Rejected Non-Bankruptcy Alternatives.

TURN submits that PG&E's motion fails to provide sufficient support for its request for an exemption. It is a two-page motion seeking an exemption that would apply to as much as $5.5 billion of debtor-in-possession financing. Should the utility fail to supplement its showing with sufficient support (perhaps during the upcoming PHC), the motion should be denied.

If the Commission is nevertheless inclined to grant the motion, it should require the more detailed public interest showing described above. In addition, the Commission should require PG&E to share with the Commission the analysis that led the utility to conclude that a Chapter 11 bankruptcy filing was in the best interests of the utility and its stakeholders, particularly ratepayers. According to its 8-K statement, "PG&E believes it currently could access, outside of a restructuring under Chapter 11, a significant amount of capital," but only in the form of debts secured by utility assets or in more esoteric forms of alternative capital.[12] In this way the utility "could extend its liquidity for an extended period of time by using its assets to secure the issuance of additional capital or by accessing such forms of alternative capital." But "[a]fter a thorough review," PG&E's boards of directors have concluded that pursuing such an approach outside of Chapter 11 "is not in the best interests of PG&E and its stakeholders," as well as not adequately addressing the issues and challenges PG&E faces.[13] PG&E's instant motion is premised on the assumption that it is reasonable for the utility to initiate a Chapter 11 bankruptcy

[12] PG&E Motion, Attachment A (January 14, 2019 8-K filing), p. 5.

[13] *Id.*

proceeding at its earliest opportunity. PG&E's 8-K statement describes the utility's consideration of non-bankruptcy options that would have kept it liquid "for an extended period of time," and a "thorough review" that concluded the non-bankruptcy options were not in its best interests. Before taking any action that relies either directly or indirectly on the results of PG&E's own internal analysis, the Commission should direct PG&E to share with the agency and interested parties the materials associated with its "thorough review."

If the Commission ultimately decides to grant the exemption, it should do so only with appropriate terms and conditions, as provided for in Sections 829(c) and 853(b). One such condition would require PG&E to report to the Commission and interested parties the details about any DIP financing it enters into that involves an encumbrance of any kind.

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